LIBRARY
PREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUN 14 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1968

No. 195 [redacted]

CHEMICAL TANK LINES, INC., a corporation, *Appellant*

v.

EDWARD W. HOLSTINE, *Appellee*

On Appeal From the Supreme Court of Appeals of West Virginia

JURISDICTIONAL STATEMENT

J. CAMPBELL PALMER, III
300 Security Building
Charleston, West Virginia

ALBERT L. BASES
27 William Street
New York, New York

Counsel for Appellant

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

	Page
Jurisdictional Statement	1
Opinion Below	2
Jurisdiction	2
Questions Presented	3
Statutes Involved	5
Statement of Case	6
The Questions Are Substantial	12

TABLE OF CITATIONS

Barker v. Blankenship, 271 Ky. 213, 111 S.W. 2d 592 15
Casanova v. Kreuseh, 21 W. Va. 720 15, 20
Castilleja v. Camero, 402 S.W. 2d 272, Texas 15
Charleston Federal Savings & Loan Association, et al. v. George P. Alderson, State Tax Commissioner of W. Va., 324 U.S. 182 89 L. ed 857 3
Cheseboro v. Los Angeles County Flood Control District, 306 U.S. 459, 83 L. ed 921, 923 3
Collins v. Welsh, 75 F.2d 894, 897 13
Douglas v. California, 372 U.S. 353, 9 L. Ed 2d 811 21
Glus v. Brooklyn Eastern District Terminal, 359 U.S. 231, 3 L. ed 2d 770, 79 S. Ct. 760 23
Griffin v. Illinois, 351 U.S. 12 21
N & W Railway v. County Court, 123 W. Va., 461, 15 S.E. 2d 574 17
Clarence Norris, Petitioner v. State of Alabama, 294 U.S. 587, 79 L. ed 1074 3
Schulenburg v. Signatrol, 37 Ill. 2d 352, 226 N.E. 2d 624 15
Scott v. Coal & Coke Railway Co., 70 W. Va. 777, 74 S.E. 992 21
Sites v. Weiland, 5 Leigh 80 (Va.) 15, 21
Southwest Virginia Hospitals v. Lipps, 193 Va. 191, 68 S.E. 2d 82 15
State v. Legg, 151 W. Va. 401, 151 S.E. 2d 215 21
Warren W. Wilson, et al. v. Otho A. Cook, Commissioner of Revenues for State of Arkansas, 327 U.S. 474, 90 L. ed 793 3

Page

STATUTES, AUTHORITIES AND CONSTITUTIONAL PROVISIONS

Code of West Virginia, 58-5-16 .....3, 5, 14, 15, 24
Code of West Virginia 58-5-12 16
Constitution of West Virginia:
Article 3, Section 10 .....5, 9, 13
Article 8, Section 3 15
Article 8, Section 6 .....13, 14
Article 5, Section 10 16
Article 5, Section 12 16
Article 8, Section 1 15

Rules of the Supreme Court of Appeals of West Virginia:
Rule 4, Section 11 .....10, 18

Restatement of Torts, Section 428 .....4, 25, 27
Michie's Jurisprudence for Virginia and West Virginia:
Section 148, page 254 19
Section 159, page 263 19
Section 166, page 266 19

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1967

No.

CHEMICAL TANK LINES, INC., a corporation, *Appellant*

v.

EDWARD W. HOLSTINE, *Appellee*

On Appeal From the Supreme Court of Appeals of West Virginia

JURISDICTIONAL STATEMENT

Appellant Chemical Tank Lines, Inc., a corporation, appeals from the judgment of the Supreme Court of Appeals of West Virginia, entered on March 20, 1968, timely Motion to Reconsider being denied by the Supreme Court of Appeals of West Virginia on March 25, 1968. The Supreme Court of Appeals of West Virginia, after allowing an Appeal from the Circuit Court of Kanawha County, State of West Virginia and

granting a Writ of Supersedeas staying execution of the judgment, on March 20, 1968 dismissed said appeal by reason of Motion therefor by Appellee solely because of Appellant's failure to file a supersedeas bond as provided by West Virginia Statutes. Notice of Appeal was filed in the Supreme Court of Appeals of West Virginia, in the Circuit Court of Kanawha County, West Virginia, and in the Court of Common Pleas for Kanawha County, West Virginia on June 7, 1968. Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The opinion of the Supreme Court of Appeals of West Virginia is not reported and copies of the Court's Orders of March 20, 1968 and March 25, 1968 are attached hereto as Appendix "A".

JURISDICTION

This is an Appeal from an order of the Supreme Court of Appeals of the State of West Virginia dismissing an Appeal previously granted to Appellant by said Court in a personal injury action originally instituted by Appellee in the Court of Common Pleas, Kanawha County, State of West Virginia, which resulted in a verdict in Appellee's favor in the sum of $350,000.00. After overruling Appellant's timely Motion for a New Trial and for judgment under Rules of Civil Procedure 50(b), judgment was entered on the verdict. Appellant petitioned the Circuit Court of Kanawha County, State of West Virginia, for Writ of Error or Appeal. Following refusal by that Court to assume jurisdiction, a Petition for Writ of Error or

Appeal and also for a Writ of Supersedeas was filed in the Supreme Court of Appeals of the State of West Virginia. An Appeal and Writ of Supersedeas were thereafter granted on September 11, 1967, the latter conditioned according to law. Thereafter, on March 20, 1968, solely by reason of Appellant's failure to file, within two months, pursuant to West Virginia Statute, Code 58-5-16, a supersedeas bond in the amount of $500,000.00 as fixed by the Court, the Appeal previously granted was dismissed. A timely motion to re-consider was summarily denied by said Supreme Court on March 25, 1968.

The jurisdiction of the Supreme Court of the United States to review this decision is conferred by Title 28 United States Code, Section 1257(2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment of the Supreme Court of Appeals of West Virginia.

Cheseboro v. *Los Angeles County Flood Control District,* 306 U.S. 459, 83 Law Ed. 921, 923.

Charleston Federal Savings & Loan Association, et al. v. *George P. Alderson, State Tax Commissioner of West Virginia,* 324 U.S. 182, 89 Law Ed. 857.

Warren W. Wilson, et al. v. *Otho A. Cook, Commissioner of Revenues for State of Arkansas,* 327 U.S. 474, 90 Law Ed. 793.

Clarence Norris, Petitioner v. *State of Alabama,* 294 U.S. 587, 79 Law Ed. 1074.

QUESTIONS PRESENTED

1. Did the Supreme Court of Appeals of West Virginia deprive Appellant of its constitutional rights and violate Amendment XIV of the Constitution of the

United States and Article 3, Section 10 of the Constitution of the State of West Virginia when, having granted an appeal from a judgment entered in the Court below in the amount of $350,000.00 and having further granted upon the same Petition, a Writ of Supersedeas to the judgment entered below, thereafter upon motion by Appellee, dismissed the Appeal and the Writ of Supersedeas awarded, solely because Appellant failed to file a supersedeas bond within the two month period prescribed by West Virginia Statute?

2. Did the Supreme Court of Appeals of West Virginia violate the constitutional rights of Appellant and the due process clause of the 14th Amendment to the Constitution of the United States in depriving Appellant of a hearing on the merits of an Appeal which it had previously allowed and in refusing to hold that Appellant was estopped from moving for a dismissal of the Appeal for failure timely to file a supersedeas bond, where Appellant's failure timely to file said bond was occasioned solely by its understanding that an agreement had been reached between the parties to waive the filing of the bond and to enter an Order thereon because Appellant had exhibited to Appellee uncontestable evidence that there was adequate insurance coverage to pay said judgment, interest and costs, if affirmed, and said bond was immediately filed when said agreement was disavowed by Appellee?

3. Did the action of the Supreme Court of West Virginia deprive Appellant of a constitutional right of an appeal involving, among other points, a trial Court's erroneous determination that Section 428 of the Restatement of the Law of Torts, Vol. II, was applicable and that operating trucks on the public highways in the United States "involves an unreasonable risk of

harm to others," and did this action by the trial Court deprive Appellant of its constitutional right to jury trial on this issue?

STATUTES INVOLVED

Amendment XIV Constitution of the United States providing as follows:

> "* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any persons of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

and Chapter 48, Article 5, Section 16, page 318, Michie's West Virginia Code providing as follows:

> "§ 58-5-16. TIME FOR PRESENTING RECORD AND GIVING BOND.
>
> "No process shall issue upon any appeal, writ of error or supersedeas allowed from or to a final judgment, decree or order, if, when the record is delivered to the clerk of the appellate court, eight months shall have elapsed since the date of such final judgment, decree or order; but the appeal, writ of error or supersedeas shall be dismissed whenever it appears that eight months have elapsed since such date before the record is delivered to such clerk, or that two months have elapsed since the date when the appeal, writ of error or supersedeas was granted before such bond is given as is required to be given before the appeal, writ of error or supersedeas takes effect."

Article 3, Section 10, Constitution of the State of West Virginia providing as follows:

"No person shall be deprived of life, liberty or property, without due process of law, and the judgment of his peers."

STATEMENT OF THE CASE

Appellant, Chemical Tank Lines, Inc., a Delaware Corporation, doing business in the State of West Virginia, hauled raw chemicals from West Virginia plants to processors and manufacturers in other states. It owned its own trailers and leased tractors to haul them, including the drivers thereof, but such drivers were subject to approval by Chemical.

Immediately before April 10, 1965, Holstine, plaintiff below, applied to Brumfield, tractor owner and a defendant below, for a position as driver and was referred to Chemical Tank Lines safety director, who passed him for employment. On April 9th he undertook, with another driver, a trip from Charleston, West Virginia to Akron, Ohio. By reason of the admitted and stipulated negligence of the driver of the tractor, Holstine was injured in Ohio on the early morning of April 10, 1959.

A Declaration was filed in the Court of Common Pleas in Kanawha County, West Virginia to the May 1960 Rules of that Court in accordance with the then West Virginia procedure. In October 1960, special Pleas were filed by Brumfield and Chemical Tank Lines alleging each was covered by Workmen's Compensation, and that Holstine was an employee and hence prohibited by West Virginia Statute from suing his employer.

In October 1965, replications were filed to these special pleas admitting the truth thereof but denying the legal effect thereof. A jury verdict ensued with a

judgment against Chemical Tank Lines for $350,000.00. On his Motion, Brumfield was dismissed as a defendant, as being an independent contractor covered by Workmen's Compensation. Motions for New Trial and Judgment under West Virginia Rules Civil Procedure 50(b) were timely filed.

The trial Court, in effect and substance, directed a verdict for Appellee herein by its application of Section 428 of the Restatement of Torts. It held and instructed the jury that the driving of a tractor trailer in Interstate Commerce involved an unreasonable risk of harm to others so as to cause an employer to be liable for the negligent acts of an employee of an independent contractor. Appellant herein contended in the trial and Appellate Courts that such a ruling was in violation of its constitutional rights under the Constitutions of both the State of West Virginia and the United States, and further that such holding constituted an unlawful burden on Interstate Commerce.

All Motions of the Appellant were overruled by the trial Court. A proper and timely record was prepared and filed, including a full transcript of the testimony and a Writ of Error was sought from the Circuit Court of Kanawha County, West Virginia. On May 10, 1967, the Circuit Court of Kanawha County refused to grant the Writ, and required a cost bond for Appeal to the Supreme Court of Appeals for West Virginia, which was properly signed and filed on that day with the Clerk of said Circuit Court.

On June 23, 1967, the entire record, together with a Petition for an Appeal or Writ of Error and a Writ of Supersedeas was presented to the Supreme Court of Appeals of West Virginia. On September 11, 1967, an appeal was allowed. And, a Writ of Supersedeas

granted, providing Appellant file with the Circuit Court a bond in the amount of $500,000.00, conditioned according to law.

Thereafter, counsel for Appellant entered into negotiations with counsel for Appellee whereby it was agreed that could counsel for Appellant furnish proof that there was adequate and uncontestable insurance coverage, to satisfy the entire judgment, interest and cost, if affirmed, that an agreed Order waiving the filing of a supersedeas bond in the amount of $500,000.00 would be entered in the Supreme Court of Appeals of West Virginia. Letters contained in the record from counsel for Appellant and counsel for one of the insurance companies that he represented as well as the affidavits of counsel representing both parties corroborate this statement.

Such information was furnished counsel for the Appellee, plaintiff below, and a proposed Order was presented to Appellee's counsel by Appellant's counsel for signature. No further action was taken by Appellee nor any notice given to Appellant until after the two months set by statute for the filing of the bond had expired, at which time a Motion to dismiss the Appeal was made by Appellee solely because said bond had not been filed.

Other intermediate Motions had previously been made contending the Appeal had been improvidently allowed because of Appellant's failure to comply with the statutory proceedings in presenting the Appeal. These were never decided by the Supreme Court of Appeals of West Virginia.

Such Motion to Dismiss for failing to file bond was filed without prior notice to counsel for Appellant who

did not receive notice thereof until subsequent to the filing. Said Motion was supported by Affidavits taken ex parte, all in violation of the rules of practice of the Supreme Court of Appeals of West Virginia and additionally, it was filed by counsel who was not then a counsel of record in the case. On the following day, a proper and adequate bond in the amount of $500,000.00 was filed with the Circuit Court of Kanawha County as provided by law.

Motion was thereafter made by Appellant to dismiss the Motion to Dismiss; briefs were filed, and on February 6, 1968, the Supreme Court of Appeals set down for argument all preliminary Motions, among which was the Motion to Dismiss for Failure to File Bond.

Argument was set on the 19th day of March, 1968, argument had, and on the following day, March 20, 1968, the Supreme Court of Appeals of West Virginia entered its Order dismissing the Appeal solely on the grounds of Appellant's failure to timely file the bond as prescribed by West Virginia Statute, Code 58-5-16, as amended, and on the further ground that such filing was mandatory to complete jurisdiction and that the Court had no further jurisdiction of the matter. Several days following, a Motion to Reconsider and Reinstate was filed by Appellant in the Supreme Court of Appeals of West Virginia, setting out that such dismissal based upon said Statute was in contravention of the constitutional rights of the Appellant, violating the provisions of both the Constitution of the State of West Virginia, Article 3, Section 10 providing as follows:

> "No person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers."

And the Constitution of the United States, Amendment XIV, providing as follows:

> "* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The following day, March 25, 1968, the Supreme Court summarily refused the Motion to Reconsider but granted a stay to appeal to the Supreme Court of the United States in accordance with West Virginia Statutes.

Thereafter, under and by virtue of Rule 4, Section 11 of the Rules of the Supreme Court of Appeals of West Virginia, a Motion was filed by Appellant to reinstate the Appeal, said Rule stating in its pertinent parts as follows:

> "When by these rules . . . an act is required or allowed to be done at or within a specified time, this Court, or a Judge thereof, or the Judge, for cause shown may at any time, in term or vacation in its discretion . . . (2) upon motion made after the expiration of the specified period permit the act to be done where good cause is shown for the failure to act."

said Motion requesting the Court to enlarge the time within which the supersedeas bond could have been given to include the period up to the time when said bond was filed which was 17 days after the expiration of the two months. Such Motion was likewise denied by the Supreme Court of Appeals of West Virginia on April 22, 1968.

Substantial questions were raised on the Appeal, the first of which was whether or not Appellant's rights under the Constitutions of the State of West Virginia and the United States were violated by the action of the trial Court in applying Section 428 of the Restatement of Torts. The trial Court held that all trucks traveling the highways of the United States involved an unreasonable risk of harm to others, by reason of which, in substance, a directed verdict was given by the trial Court to the Appellee. The dismissal of the Appeal by the Supreme Court of Appeals of West Virginia deprives Appellant of a review of this important constitutional question.

Secondly, after testimony that Appellee had been paid $20.00 for a portion of one night's work, and over objection and motion for mistrial made by counsel for Appellant, counsel for Appellee without evidence of any reasonable expectancy of future employment was permitted to exhibit to the jury a large chart showing that future wages of more than $200,000 were lost, all in violation of the unanimous decisions of the Supreme Court of West Virginia which require proof of loss of future earnings to be made to a reasonable certainty.

And lastly, whether or not the motion for judgment notwithstanding the adverse verdict should not have been sustained by virtue of the fact that the Appellee Holstine's exclusive and sole remedy was under the workmen's compensation laws of the State of West Virginia.

The above questions including the substantial federal questions here involved were properly raised below, the federal question concerning the dismissal for failure to file bond could and did arise only after said motion to dismiss was made.

THE QUESTIONS ARE SUBSTANTIAL

I. The issues involved in this Appeal appear to be those of first impression in this Court and Appellant is unable to find any cases previously passed upon by this Court in which the issues seem identical or even analogous except as to Appellant's second point dealing with estoppel. Constitutional questions were initially raised by Appellant in the Court of Common Pleas of Kanawha County, West Virginia and thereafter additional constitutional questions were raised in the Supreme Court of Appeals of West Virginia after that Court entered an Order dismissing an Appeal and Writ of Supersedeas previously granted by it solely because of Appellant's failure to comply with a Statute of West Virginia which required the filing of a supersedeas bond within two months following the entry of an Order granting Appellant an Appeal and Writ of Supersedeas. On timely Motion to Reconsider, Appellant urged the unconstitutionality of said statute and its violation of the Constitutions of both the United States of America and of the State of West Virginia.

Since the Appellant contends that the trial Court had in substance directed a verdict for Appellee, thus depriving Appellant of a trial by jury and the "judgment of his peers" as provided by the Constitution of the State of West Virginia to dismiss this appeal without granting the Appellant a hearing on the merits deprived Appellant of its property without due process of law and likewise violated both the Constitutions of the United States of America and the State of West Virginia.

Amendment XIV of the Constitution of the United States provides in part:

> "* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article 3, Section 10 of the Constitution of the State of West Virginia provides:

> "No person shall be deprived of life, liberty or property, without due process of law, and the judgment of his peers."

The Ninth Circuit held in the case of *Collins* v. *Welsh*, 75 F.2d 894, 897 that rights acquired by a judgment are property rights which cannot be taken without due process of law. To permit the Appellee to enforce a money judgment in the sum of $350,000.00 solely by reason of Appellant's failure timely to file a bond as required by West Virginia Statutes where the Supreme Court of Appeals of the State of West Virginia had previously found that there were good and sufficient issues raised to award an appeal,* clearly constitutes a violation of Appellant's constitutional rights and constitutes a taking of its property without due process of law, all in violation of the rights guaranteed to the Appellant under the Constitutions of the United States of America and the State of West Virginia.

The issue presented in this Appeal is unique in that Appellant contends that there has been a violation of

---

* Article 8, Section 6, Constitution of West Virginia provides for the allowance of an appeal "only after said court or judge shall have examined and considered the record and assignment of errors, and is satisfied that there is error in the same, or that it presents a point proper for the consideration of the supreme court of appeals."

the due process clause of the 14th Amendment by a State Court of Last Resort. This violation is based upon an arbitrary denial of a basic right previously conferred and allowed by the West Virginia Supreme Court because Appellant failed timely to file a supersedeas bond. Appellant has been deprived of its right to have its Appeal heard by the highest Court of West Virginia on a technical ground, after that Court had determined that a sound basis for the appeal existed. In the State of West Virginia, there is no appeal as a matter of right such as exists in many other Courts of Last Resort and in the Circuit Courts of Appeal but a petition for an Appeal may be filed as was done by Appellant on May 23, 1967. On September 11, 1967, an Appeal was awarded Appellant, process thereon was issued, completed and filed, and the right to be finally heard on such Appeal was then taken away by the West Virginia Supreme Court of Appeals for a reason entirely unconnected with the right to appeal or the questions involved. (Article 8, Sec. 6, Constitution of West Virginia). The West Virginia Court relied solely upon a Section of the Code of West Virginia, 58-5-16 is dismissing Appellant's appeal. This provision states:

> "§ 58-5-16 TIME FOR PRESENTING RECORD AND GIVING BOND.
>
> "No process shall issue upon any appeal, writ of error or supersedeas allowed from or to a final judgment, decree or order, if, when the record is delivered to the clerk of the appellate court, eight months shall have elapsed since the date of such final judgment, decree or order; but the appeal, writ of error or supersedeas shall be dismissed whenever it appears that eight months have elapsed since such date before the record is delivered to such clerk, or that two months have elapsed since the date when the appeal, writ of error or super-

sedeas was granted before such bond is given as is required to be given before the appeal, writ of error or supersedeas takes effect."

Such a statute has been held to be mandatory by the highest Court of that State, contrary to its previous decisions and those of the vast majority of our states who have determined that similar statutes are not jurisdictional.* It is Appellant's position that said Statute was not mandatory as to jurisdiction and it is unconstitutional in that the jurisdiction of the Supreme Court of Appeals of West Virginia is given by the Constitution of West Virginia and may not be abrogated by the Legislature.** To deny an Appeal which it has previously granted constitutes an arbitrary and unreasonable exercise of power by the West Virginia Court. The Writ of Supersedeas has absolutely *nothing to do with the Appeal and invokes only a* stay of execution during appeal.

Article 8, Section 1 of the Constitution provides that judicial powers of the State shall be vested in the Supreme Court of Appeals to consider a case in which it had already granted the right to have it so determined by the awarding of the Writ of Appeal. The enactment by the legislature of the State of West Virginia of a Statute (Code 58-5-16) requiring the Court to dismiss an appeal previously granted because of a failure to file a supersedeas bond as required by the Statute is an

---

* *Schulenburg* v. *Signatrol*, 37 Ill. 2d 352, 226 N.E. 2d 624
Castilleja v. *Camero*, 402 S.W. 2d 272, Texas
Barker v. *Blankenship*, 271 Ky. 213, 111 S.W. 2d 592
Casanova v. *Kreuseh*, 21 W. Va. 720
Sites v. *Weiland*, 5 Leigh 80 (Va.)
Southwest Virginia Hospitals v. *Lipps*, 193 Va. 191, 68 S.E. 2d 82

** Article 8, Section 3.

invasion of the powers of the Judiciary. Hence the dismissal of the Appeal by the Supreme Court of Appeals of West Virginia in reliance upon such statutes was in violation of both the Constitution of West Virginia and the Constitution of the United States of America.

Appeals may be granted without supersedeas so that the writ for the granting of an appeal and the writ granting supersedeas are separate and distinct matters under Code of West Virginia (58-5-12); hence, the failure to perform one part would not effect the granting of an appeal.

This historical difference, as will be later set out, is recognized in Code of West Virginia under the title "Appeal and Error", Chapter 58, Article 5, Section 12, in which it is stated:

> "The clerk of the appellate court shall thereupon issue a summons against the parties interested, other than the petitioners, that they may be heard, *and also* issue any supersedeas which may be awarded, which summons or supersedeas may be served upon the party in person or his attorneys in the court from which the appeal or writ of error is taken." (Italics ours)

This follows Section 10 which provides:

> "The Court or Judge to whom a petition (for an Appeal, Writ of Error or Writ of Supersedeas) is duly presented, if our opinion that the decision complained of ought to be reversed, may allow an appeal, writ of error *or* supersedeas, and may stay proceedings in whole or in part." (Parenthesis and Italics added).

In Section 12 above quoted, it will be noticed that the Code provides that a summons shall be issued

against the parties interested, "and also issue any supersedeas which may be awarded." Therefore, the allowing of an appeal or awarding of supersedeas are two separate and distinct matters. In fact, in the case at bar, the Appeal was awarded as disclosed by the record, summons was issued against all Appellees, service was accepted by an attorney of record, and the process thus completed was timely returned to the Clerk of the Supreme Court of Appeals of West Virginia from whose office the summons had originated.

In the case of *N & W Railway* v. *County Court,* 123 W. Va. 461, 15 S.E. 2d 574, the Court stated at page 464:

> "Supersedeas is now regarded and generally used as an ancillary process in conjunction with a writ of error. The latter writ brings a certified copy of the record before the reviewing Court, but *does not suspend the operation of the final judgment. That function is performed by the supersedeas,* the order awarding which *ordinarily* requires the giving of a bond conditioned upon the satisfaction of the judgment before the writ issues. However, due to the fact that our present statute, or its equivalent, was first enacted in the State of Virginia in the Virginia Code of 1819, and since the meaning of a statute is not to be altered by a change in the meaning attached to its terms by popular usage since its enactment, it would seem to be necessary to interpret our present statute in accord with the meaning of the word 'supersedeas' at the time of its original enactment, it having been transmitted to us through the Virginia Code of 1849, that being the last enacted codification prior to this State's formation.
>
> "Going back no further than the Virginia Code of 1819, we believe that it may safely be asserted that at that time *the writ of supersedeas was an*

original process of an appellate court, the operation of which was dual, since it brought the record of the proceedings before the appellate court and held in abeyance the effect and operation of the order or judgment of the inferior tribunal.

"Treating our present statute in the light of that definition of the word supersedeas, we are of the opinion that in a summary statutory proceeding questioning the validity of a levy, *the actual issuance of a writ of supersedeas is a condition precedent to the reviewing court acquiring jurisdiction.* The entire levy must be suspended and a separate part of it cannot be questioned due to the fact that an error affects the whole . . ." (Emphasis added).

It is Appellant's contention that the Appeal is separately granted. The giving of a supersedeas bond in compliance with the Writ of Supersedeas granted is a separate and distinct matter. Even if the bond was not given within proper time, the Court should only have dismissed the Writ of Supersedeas and proceeded with the Appeal, because the two were not connected.

Additionally, the Supreme Court of Appeals of West Virginia could and should have granted additional time for good cause shown, for the execution of a valid and collectible bond to put into effect the Writ of Supersedeas, before dismissing the case. The Court had an opportunity to do so when a petition was filed on April 5, 1968 in accordance with the Court's own Rule IV, Section 11* requesting it to enlarge the time for

---

* *"When by these rules, or by a notice given thereunder or by order of this court, an act is required or allowed to be done at or within a specified time, this court, * * * for cause shown may at any time, * * * in its discretion * * * (2) upon motion made after the expiration of the specified period permit the act to be done where good cause is shown for the failure to act."*

filing supersedeas bond to include November 29, 1967 when said bond was actually filed but on the 22nd day of April, 1968 refused to do so.

The giving of a bond for costs by Appellant on May 10, 1967, was sufficient here to act as an appeal bond, because the amount of $5,000 was adequate.

In 1(b) Michie's Jurisprudence under the heading "Appeal and Error" it is stated in Section 159, page 263:

> "The appeal or writ of error, if granted, may be with or without supersedeas. The effect of a supersedeas is to suspend the enforcement of the judgment or decree; in all other respects it leaves the matters as they were when the supersedeas took effect, until the appeal is decided."

And in Section 148, page 254 appears this statement:

> "An appeal or writ of error may be granted with or without supersedeas as requested . . .
>
> "A supersedeas bond is one of indemnity, the object of which is to secure to a successful litigant the ultimate fruits of his recovery . . . and to insure him against loss from the possible insolvency of his debtor, or from other cause, pending the appeal."

And in Section 166, page 266, entitled "Supersedeas", it is further stated:

> "During the early days of the commonwealth of Virginia a supersedeas was an independent process by which the record was brought up for review by a superior court, and further proceedings in the cause in the court below were stayed. But it is now, and has long been, in practice at least, merely an *auxiliary* process used as an adjunct

> to an appeal or writ of error. It operates to stay all further proceedings on the judgment, or as to any matter embraced therein. Under the present statutes the appellate court may grant the appeal or writ of error with or without supersedeas."

That section states that also it is now provided in Virginia that where an appeal or writ of error is granted without supersedeas and later an occasion arises for it, the Court may, upon motion of the Appellant, grant a supersedeas, fix the amount thereof and the time within which bond shall be given. See *Casanova* v. *Kreusch,* supra.

It will be noted that the West Virginia Court held that the requirement for giving a bond was a requirement for an adequate and sufficient bond. The Court further held that when the bond was insufficient, it could and would allow Appellant an additional time within which to file a good and sufficient bond; thus showing the matter is not jurisdictional, but discretionary.

That Court held that even though Appellant had failed within the time limit of the Statute after having the case dismissed in the Court of Appeals, to deposit with the Clerk a sufficient amount to pay for the printing of the record, the case would be dismissed, but even though dismissed a second writ of error would be awarded the plaintiff in error "as a matter of course".

Again, to show that the bond for appeal was different from that provided by the Writ of Supersedeas, the Court in *Casanova,* supra, said:

> "The Legislature in February 1825, passed an act authorizing appellate courts to allow writs of

> error or appeal upon bond or security being given for the costs of a writ of error or appeal only; provided such writ of error or appeal should not operate as a supersedeas to the judgment or decree entered below."

To demonstrate that the matter was not jurisdictional, the Court cited *Sites* v. *Weiland,* 5 Leigh 80 (Va.), wherein the Statute said that when the record was not filed within six calendar months, "such appeal, writ of error or supersedeas shall be dismissed *unless good cause be shown to the contrary.*" (Italics ours).

The Court concluded that where a writ of error or appeal has been dismissed because of the failure of the Appellant to give a new bond with security when required by the Court, that the party is not entitled to a second writ of error without supersedeas.

The Supreme Court of Appeals of West Virginia relied on *Scott* v. *Coal & Coke Railway Co.,* 70 W. Va. 777, 74 S.E. 992 and *State* v. *Legg,* 151 W. Va. 401, 151 S.E. 2d 215. The first case merely upholds the point that a supersedeas is a different and separate writ from an Appeal while the second is a criminal case and wholly inapplicable. The reasoning of the Court in *Legg,* supra, which the Court has utilized here is completely contrary to recent decisions of this Court; the West Virginia Court having held "A right of review in criminal cases is not a necessary element of due process of law and it is wholly within the discretion of each state to refuse it or grant it on terms . . ." *

It is quite true that the awarding of a Writ of Supersedeas does not suspend the execution of judg-

---

* See *Douglas* v. *California,* 372 U.S. 353 to the contrary and also *Griffin* v. *Illinois,* 351 U.S. 12.

ment until the required bond is given. During the interim, the judgment-holder below has the right to collect on his judgment or pursue any course for the collection of it. The supersedeas bond merely stays the enforcement of the judgment given below until the matter is heard by the appellate court. If the bond is not given, then there is no stay prohibiting the judgment creditor from making collection.

Concluding this point, Appellant submits that it has conclusively established a violation by the Supreme Court of Appeals of the State of West Virginia of the constitutional rights of Appellant and its Order entered was arbitrary, capricious and unlawful.

II. The record in this case contains affidavits, letters and a brief filed by Appellant's counsel demonstrating that Appellant's attorney was acting under the honest impression that based upon negotiations between counsel for the Appellant and Appellee the supersedeas bond in the sum of $500,000.00, as fixed by the Supreme Court of Appeals of West Virginia, would be waived and an appropriate consent Order entered. Seventeen days following the expiration of the statutory period set forth in West Virginia Statute 58-5-16, Appellee's attorneys made a motion to dismiss the Appeal for failure to timely file the supersedeas bond, which motion was subsequently granted by the Supreme Court of Appeals of West Virginia solely on that ground. On the following day the bond was filed. It is the contention of Appellant based on the affidavits of all counsel and the documentary evidence, that counsel for Appellees were estopped by their actions from seeking a dismissal of this case because of the failure to file the supersedeas bond.

A sound basis for Appellant's position is found in *Glus* v. *Brooklyn Eastern District Terminal,* 359 U.S. 231, 3 L.ed 2d 770, 79 S. Ct. 760.

There the plaintiff brought an action under the Federal Employers' Liability Act to recover damages for an industrial disease he allegedly contracted in 1952 while working for the defendant. The action was brought after the statutory 3-year period of limitation (§ 6 of the act) had lapsed, but plaintiff claimed that defendant was estopped from raising this limitation because it had induced the delay by representing to him that he had 7 years in which to sue. The District Court dismissed the action on the ground that the defense of estoppel was not available against the statute of limitations contained in the Federal Employers' Liability Act, the statutory provision being an integral part of a new cause of action created by that act. The Second Circuit affirmed.

On certiorari, the Supreme Court unanimously reversed, holding, in an opinion by Black, J., that the doctrine of estoppel could be invoked by the plaintiff, that it was error for the trial court to dismiss the action, and that whether plaintiff could in fact make out a case calling for application of that doctrine must await trial. In speaking for the Court, Justice Black stated on page 772:

> "To decide the case we need look no further than the maxim that no man may take advantage of his own wrong. Deeply rooted in our jurisprudence this principle has been applied in many diverse classes of cases by both law and equity courts and has frequently been employed to bar inequitable reliance on statutes of limitations. In Schroeder v. Young, 161 US 334, 40 L ed 721, 16 S Ct 512, this Court allowed a debtor to redeem property sold

to satisfy a judgment, after the statutory time for redemption had expired although the statute granting the right to redeem also limited that right as to time. The Court held that the purchasers could not rely on the limitation because one of them had told the debtor 'that he would not be pushed, that the statutory time to redeem would not be insisted upon, and [the debtor] believed and relied upon such assurance.' The Court pointed out that in 'such circumstances the courts have held with great unanimity that the purchaser is estopped to insist upon the statutory period, notwithstanding the assurances were not in writing and were made without consideration, upon the ground that the debtor was lulled into a false security.' 161 US, at 344. As Mr. Justice Miller expressed it in Union Mut. L. Ins. Co. v. Wilkinson (US) 13 Wall 222, 233, 20 L ed 617, 622, 'The principle is that where one party has by his representations or his conduct induced the other party to a transaction to give him an advantage which it would be against equity and good conscience for him to assert, he would not in a court of justice be permitted to avail himself of that advantage. And although the cases to which this principle is to be applied are not as well defined as could be wished, the general doctrine is well understood and is applied by courts of law as well as equity where the technical advantage thus obtained is set up and relied on to defeat the ends of justice or establish a dishonest claim.' "

It is the contention of the Appellant that it was denied its right of due process and final hearing by the failure of the Supreme Court of Appeals of the State of West Virginia to determine whether or not the evidence offered by the Appellant was sufficient to invoke the doctrine of estoppel and thus result in a prohibition from utilization of West Virginia Statute

58-5-16, in the event this Court holds such Statute and its application to be constitutional.

III. It is the contention of the Appellant that the trial Court's application of Section 428 of the Restatement of the Law of Torts* was clearly erroneous and unconstitutional and that the action of the Supreme Court of Appeals of West Virginia deprived the Appellant of its constitutional right to a hearing and a decision on the constitutionality of this issue.

In order to apply this section, it was necessary for the trial Court to make a determination as a matter of law that operating trucks on the public highways of the United States "involves an unreasonable risk of harm to others". That the driving of any motor vehicle involves a risk can hardly be disputed; that the trucking industry "involves an unreasonable risk of harm to others" is without basis either in law or in fact. There was no evidence of any kind introduced during trial by reason of which the Court as a matter of law could have made such a determination. It was a controverted issue, and should only have been submitted to the jury if competent evidence had been introduced. The Court simply stated and held as a matter of law that the operation by Chemical Tank Lines, Inc. of tractor-trailers over the United States "involves an unreasonable risk of harm to others" and therefore Appellant became liable for the negligence of the employee of an independent contractor employed to carry on such work.

---

* "An individual or a corporation carrying on an activity which can be lawfully carried on only under a franchise granted by public authority and which involves an unreasonable risk of harm to others, is subject to liability for bodily harm caused to such others by the negligence of a contractor employed to do work in carrying on the activity."

The trial Court after long discussion and consideration and claim made by Appellant as to the unconstitutionality thereof, granted Appellee's Motion to give Instruction No. 12, as amended, Transcript of Evidence 2066, as follows:

> "The Court instructs the jury that under the law in this case Chemical Tank Lines, Inc., is liable for any negligent acts of Dale Samples while operating the tractor trailer in which Edward Holstine was injured, is to be considered by the jury as negligence of Chemical Tank Lines.
>
> "You are therefore accordingly instructed that because of the stipulation in this case that Dale Samples was negligent in operating the tractor-trailer, and therefore if you believe from a preponderance of the evidence in this case that Dale Samples' negligence proximately contributed to the accident in question and to Edward Holstine's injuries, then Chemical Tank Lines, Inc. is chargeable with the negligence of Dale Samples and your verdict may be for the plaintiff, Edward Holstine and against the defendant, Chemical Tank Lines."

The Appellants contend that this was in substance a directed verdict for the Appellee and the Court did so admit (T 1981, 2052) in stating as follows: "As a practical matter, I agree with you that it is tantamount to a directed verdict, and theoretically, it is not."

The Appellant contended in the trial Court, in the Circuit Court, and in the Supreme Court of Appeals for the State of West Virginia that such a holding, with or without evidence to support it, and there was none here, constituted a taking of Appellant's property without due process of law, and violated both the Constitutions of the United States of America and the State

of West Virginia. This point was argued extensively to the trial Court originally and Appellant's contention was there overruled.

Nor did the Restatement of the Law of Torts ever contemplate encompassing the entire trucking industry. No case has been located in which Section 428 has been applied to a member of the industry, that is to a truck driver, even though the doctrine might conceivably be applied in extreme cases as to members of the general public.

If the position of the trial Court in this case is correct, it will have the effect of creating an entirely new concept of liability, seemingly effecting the entire trucking industry. Such an indictment of the trucking industry will make it an absolute insurer of all other persons and vehicles on the highway.

It is the contention of Appellant that such a result is not only improper but is discriminatory and unconstitutional, and an unlawful burden upon Interstate Commerce.

CONCLUSION

In conclusion, it is submitted that the decision of the Supreme Court of Appeals of West Virginia was erroneous and unconstitutional, in dismissing the Appeal which that Court had previously granted to Appellant. We believe that the questions presented by this Appeal are substantial and that they are of public importance. This Court should overrule the

decision of the Supreme Court of Appeals of West Virginia and direct it to reinstate Appellant's Appeal.

Respectfully submitted,

J. CAMPBELL PALMER, III
300 Security Building
Charleston, West Virginia

ALBERT L. BASES
27 William Street
New York, New York

Counsel for Appellant

APPENDIX